

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

RE: Patent Application for : Dated: September 20, 2001
R. Heiberger : Group: 3752
Serial No.: 09/237,637 : Examiner: C. Kim
Filed: January 26, 1999 : Action: **TRANSMITTAL OF**
For: **A FLUID CONTAINER CLOSURE:** **APPEAL BRIEF**
MECHANISM WITH :
DETACHABLE VALVE :
ASSEMBLY :

TO: Board of Patent Appeals and Interferences
The Commissioner of Patents and Trademark Office
Washington, DC 20231



Sir:

In reference to the above-identified patent application, please find enclosed the Appeal Brief (in triplicate) and check no. 17118 in the amount of \$155.00 for the filing fee associated with this brief. The Commissioner is hereby authorized to charge any deficiency in the payment of the required fee(s) or credit any overpayment to Deposit Account No. 13-1940.

Respectfully submitted,

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CERTIFICATE OF MAILING UNDER 37 C.F.R. §1.8

I hereby certify that the attached **APPEAL BRIEF IN TRIPLICATE, APPENDIX A AND CHECK NO. 17118 IN THE AMOUNT OF \$155.00 FOR THE FILING FEE OF THE BRIEF** is being deposited with the United States Postal Service as first-class mail in an envelope addressed to Board of Patent Appeals and Interferences, The Assistant Commissioner of Patents, Washington, Dc 20231 on this 20th day of September 2001.


Anne R. Carlberg

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

RE: Patent Application for : Date: September 20, 2001
R. Heiberger : Art Unit: 3752
Serial No.: 09/237,637 : Examiner: C. Kim
Filed: January 26, 1999 : Action: **APPEAL BRIEF**
For: **A FLUID CONTAINER** :
CLOSURE MECHANISM :
WITH DETACHABLE :
VALVE ASSEMBLY :

To: The Board of Patent Appeals and Interferences
The Commissioner of Patents and Trademarks
Washington, D.C. 20231



Sir:

This Appeal is from the Final Rejection of claims 1-5, 7, 9, 33 and 34, in the above-referenced application. In compliance with 37 C.F.R. §1.192, Appellant submits the following as its Appeal Brief in this matter through the undersigned counsel.

I. REAL PARTY IN INTEREST

The real party in interest for purposes of this appeal is Robert Heiberger, residing at 2329 13th Street, Boulder, Colorado 80304.

II. RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences known to the Appellant or the Appellant's legal representative which will have a bearing on the Board's decision rendered in this appeal.

III. STATEMENT OF STATUS OF CLAIMS IN THE APPLICATION

This Application currently includes a total of 10 claims. In the Office Action of January 11, 2001, the Examiner finally rejected claims 1-5, 7, 9, 33 and 34; Claim

35 was allowed. A copy of appealed claims 1-5, 7, 9, 33 and 34, which are the subject of this appeal, is attached hereto as Appendix A.

Claims 2, 4, 5 and 34 were rejected under 35 U.S. C. § 112, second paragraph, for indefiniteness. Claims 1-5, 7, 9 and 33 were rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 3,201,013 to Porter et al in view of U.S. Patent No. 5,145,094 to Perlmutter. Claim 34 was deemed allowable over the prior art of record.

IV. STATEMENT OF STATUS OF AMENDMENTS FILED SUBSEQUENT TO FINAL REJECTION

The Examiner's Office Action made final, dated January 11, 2001 was in response to Appellant's Amendment of October 17, 2000. Appellant filed its Notice of Appeal on April 20, 2001. Applicant proposed an Amendment After Final on April 20, 2001, but this amendment was not entered pursuant to an Advisory Action dated May 7, 2001.

V. SUMMARY OF THE INVENTION

Applicant's invention comprises a closure for a fluid container that is adapted to hold a product for dispensing. For example, a fluid container 10 includes a receptacle portion 12 and a cap portion 14 that is provided with a reclosable, pop-up type fluid discharge valve assembly 16. (7:14-18) The cap member 12 has a duct in the form of a sleeve 18 that includes an upper portion 22 and a lower portion 24. (Figure 8; 8:14-19) This sleeve 18 defines an outlet passage for fluid discharge from their receptacle 12. (8:19-21) The lower sleeve portion 24

includes guide member 32, 34 which form at least one slot 36 therebetween. (8:25-9:2)

A valve body 30 (Figures 6 and 7) is disposed for longitudinal movement within sleeve 18 between an open position (Figure 9) and a closed position (Figure 8). (13: 5-7) The valve body 30 has at least one, but preferably two ears 70 that project radially outwardly from the valve body 30 to form a stop member 66, 68 that is received in the slot 36 between guide members 32 and 34. (10:13-19) The ears are removable out of the slot 36 to allow disassembly of the valve body from the sleeve for cleaning; this is possible since valve body 30 is made from elastic material that can be deformed under certain circumstances. (13:3-24) The stop members not only limit the longitudinal movement of the valve body 30 within the sleeve 18 but also restrict rotational movement of the valve body 30 in sleeve 18. (10:24-11:1) The valve body 30 includes an open inner end 50 that communicates with the interior of the container 10 to enable the valve body 30 to be radially outwardly deformed by internal pressure within the container 10 to increase the sealing capacity of the valve body 30 in conjunction with increases in the internal pressure of the container. (12:21-13:2) The ears 70 that define the stop members 66, 68 have a chamfered surface in the form of a wedge 82 with the stop members 66, 68 being disposed on the valve body 30 for limiting longitudinal movement of the valve body 30 within the sleeve between the open and closed positions.(Figure 11; 11:1-7;10:15-11:7)

VI. STATEMENT OF ISSUES ON APPEAL

The following issues are believed by Appellant to be important for purposes of this Appeal:

- A. Does either the Dispensing and Closing Cap of Porter et al or the Dispensing Closure for Squeeze Bottle of Perlmutter show structure wherein a valve body is removable from a sleeve as recited in claim 1 of the present application ?
- B. Would it have been obvious to one having ordinary skill in the art to modify the valve and sleeve structure of Porter et al to employ the slots and ears shown in Perlmutter?
- C. Is the language of Claim 34 indefinite with respect to the stop member and its relationship to the valve body?

VII. GROUPING OF THE CLAIMS

Appellant believes that the claims are grouped such that if claim 1 falls, then claims 2-5, 7, 9 and 33 should also fall. Appellant submits that claims 1 and 34 stand-alone and that these claims are separately patentable.

VIII. LEGAL ARGUMENT

In finally rejecting claims 1-5, 7, 9 and 33 of the present application over cited prior art under 35 U.S.C. §103, the Examiner in each case has relied upon the teachings of U.S. Patent No. 3,201,013 to Porter et al ("Porter et al") in combination with U.S. Patent No. 5,145,094 to Perlmutter ("Perlmutter").

To establish a *prima facie* case of obviousness 35 U.S.C. §103 three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to

one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference or references when combined must teach or suggest all the claim limitations. Also the prior art references cannot include what is taught in the Applicant's disclosure. In establishing a *prima facie* case of obviousness under 35 U.S.C. §103, it is incumbent upon the Examiner to provide a reason why one of ordinary skill in the art would have been led to modify a prior art reference or to combine reference teachings to arrive at the claimed invention. See *Ex parte Clapp*, 227 USPQ 972, 973 (Bd. Pat. App. & Int. 1985). To this end, the requisite motivation must stem from some teaching, suggestion or inference in the prior art as a whole or from the knowledge generally available to one of ordinary skill in the art and not from the applicant's disclosure. See, e.g., *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1052, 5 USPQ2d 1434 (Fed. Cir.), *cert denied*, 488 U.S. 825 (1988); *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991) (The teaching or suggestion to make the claimed combination must not be based on applicant's disclosure); MPEP §2142.

It is axiomatic that the mere fact that the prior art structure could be modified does not make such a modification obvious unless the prior art suggests the desirability of doing so. See *In re Gordon*, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984); *In re Mills*, 916 F. 2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990); MPEP § 2143.01. When the only suggestion to combine the teachings of the references in the manner proposed by the Examiner is found in

the hindsight accorded one who first views the applicant's disclosure, an obviousness rejection under 35 U.S.C. §103 is improper. See *In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992).

In establishing the *prima facie* case of obviousness under 35 U.S.C. §103, it is also incumbent upon the Examiner to provide a reason why the proposed modification will not render the prior art unsatisfactory for its intended purpose. If the prior art being modified is rendered unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. See *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

Finally, for a proper rejection under 35 U.S.C. §103, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974); *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970) ("All words in a claim must be considered in judging patentability of that claim against the prior art."); MPEP §2143.03. Further, it should be noted that if an independent claim is nonobvious under 35 U.S.C. §103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988); MPEP §2143.03.

Accordingly, before addressing specifically the issues raised in this appeal, it is appropriate to examine the pertinent teachings of each of the Porter et al and Perlmutter references. First, Porter et al disclose a dispensing cap for a container that can move between an open position to permit fluid contents of a container to be dispensed and a closed position to prevent dispensing of the

contents. Porter et al describe a cap that has a circular top portion 14 provided with an axial opening 16. A cylindrical wall portion 12 projects axially on one side of top portion 14 while a cylindrical neck portion 24 projects axially on the other side of top portion 14 and is open at its outer end. Neck portion has an annular stop rib 26 on its interior side wall that provides an inner edge 28 that is perpendicular (normal) to the neck axis and therefore perpendicular to the interior side wall of the neck. The upper edge 30 of rib 26 is formed at an angle to the side wall. Wall portion 12 is internally treaded so as to mate with a container opening. A support bar 18 extends diametrically across the opening 16. This support bar 18 supports an axial closure pin 22. Thus, fluid can flow around the support bar, through the interior of the neck portion and out of the open outer end.

A valve body in Porter et al is defined by a stopper 32 is longitudinally movable with in the neck portion 24 between an open position (Figure 3) and a closed position (Figure 2). Stopper 32 has a hollow cylindrical body portion 34 that is in close-fitted relation to the interior of the neck. A flange 44 depends downwardly of the top of the stopper 34 to form an annular channel 46 that receives the rim of the neck portion to maintain a seal between the stopper and the neck portion during this reciprocal movement. An axial hole 48 is formed in the top of the stopper 32. When closed, this hole is sealed by closure pin 22; when open, fluid can flow out of this hole 48.

Stopper 32 or neck portion 24 of Porter et al may be formed of a resilient material so that the two pieces may be placed in the mated "telescoping" relationship. However, a stop flange 36 projects inwardly of the bottom edge of the stopper 32. This stop flange 36 is best shown in Figure 6 of Porter et al. It has a rounded lower edge (unnumbered) and an upper edge 38 that forms a shoulder that is perpendicular to the axis of the assembly. Because one of the pieces is resilient and because the bottom edge of the stopper is rounded, the neck portion and the stopper can be mated by forcing the flange 36 over the angled upper edge 30 of the stop rib 26. After this assembly is made, however, the perpendicular (to the axis) upper edge 38 of stop flange 36 will engage the perpendicular (to the axis) edge 28 of the stop rib. This prevents the outward movement of the stopper relative to the neck. That is, it locks the stopper in the neck portion. Stop flange 36 also serves to seal against the inner surface of the side wall of the neck portion since they are the same diameter.

The Perlmutter reference also teaches a dispensing closure for a container (squeeze bottle). Here, a cap 10 a circular top portion or wall 12 provided with an axial opening. An annular skirt 14 is internally treaded so as to mate with a container opening. A tubular sleeve 16 receives a closure body 26. Two arms 19 extend inwardly of the cap and are parallel to the central axis thereof and are separated by circumferential open spaces. A transverse (radial) disk 21 is supported on the ends of these arms 19, and disk 21 supports an axial post 25.

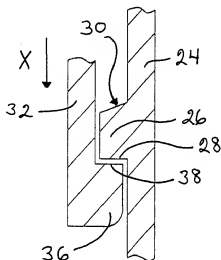
Closure body 26 has a tubular side wall 27 that terminates in an end wall 29 provided with a central opening 31. Closure body 26 is received in sleeve 16 and is movable between an open position (Figure 1) and a closed position (Figure 2). Radially outwardly projecting flanges 41 prevent removal of closure body 26 by virtue of normal-to-the-axis upper edges. The lower edges of flanges 41 are angled for initial assembly. Neither closure body 26 or cap member are disclosed to be of a resilient material.

- A. **The Dispensing and Closing Cap of Porter et al and the Dispensing Closure for Squeeze Bottle of Perlmutter fail to show structure wherein a valve body is removable from a sleeve as recited in claim 1 of the present application.**

Claim 1 of Applicant's invention specifically recites a cap member that includes a sleeve that has a guide member and a longitudinal slot along the guide member. A valve body includes an ear projecting radially outwardly with this ear being received in the slot during use and removable out of the slot thereby to permit removal of the valve body from the sleeve. In rejecting claim 1, the Examiner has taken the position that the combination of Porter et al and Perlmutter disclosure the structure. While it is the Applicant's position that the Examiner has failed to provide a motivation for combining Perlmutter with Porter et al, as discussed below, even if this combination were made, it is Applicant's position that neither Porter et al nor Perlmutter discloses a removable valve body. Rather, each of Porter et al and Perlmutter disclosure structure wherein the valve body becomes locked in the sleeve when assembled.

Turning first to Porter et al, this references discloses a valve for body in the

form of a stopper 32 that is received in a sleeve in the form of a cylindrical neck portion 24. An interlocking structure is provided by means of a stop rib 26 that has an upper edge 30 formed at an angle to the side wall and an inner edge 28 that is perpendicular to the side wall because it is normal to the neck axis. See, Column 2, lines 13-17. The valve body includes an outwardly projecting stop flange 36. It has a rounded lower edge and an upper edge 38 that forms a shoulder that is perpendicular to the axis of the assembly and therefore to the side wall when assembled. This structure is illustrated below for representative purposes.

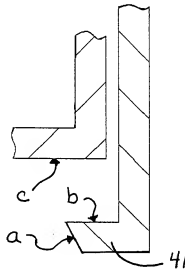


Porter et al

As may be seen from this drawing, when stopper 32 is moved in the direction "X" relative to cylindrical neck portion 24, the unnumbered rounded end of flange 36 will ride over stop rib 26 due to the interaction of the rounded edge of flange 36 and the angled face 30. However, and importantly, the reverse is not true. Once interlocked, relative movement between the stopper 32 and cylindrical

neck 24 in a direction opposite to "X" will prevent removal since surfaces 28 and 38 are planar to one another and will confront one another and lock engagement even though one of stopper 32 and neck portion 24 is formed of a deformable material. The reason is that there is no force component that would tend to deflect either neck portion 24 or the side wall of stopper 32.

Similarly, the construction of the valve in Perlmutter does not provide for a removable structure but rather an interlock structure. Perlmutter provides a tubular sleeve 16 that receives a valve body in the form of closure body 26. In the Perlmutter structure, the closure body 26 is provided, at its lower edge, with a pair of radially outwardly projecting flanges, as illustrated below.



Perlmutter

In the Perlmutter Figure, it may be seen that flange 41 has an angled face "a" that allows insertion of closure body 26 into sleeve 16. However, flange 41 has a normal face "b" that confronts surface "c" of sleeve 16 to prevent removal of closure body 26 therefrom. This structure is best seen in the Perlmutter reference,

Figures 1, 4 and 9 which, although referring to difference embodiments, are nonetheless described as having similar structure with respect to flange 41.

Here, again, the valve body, in the form of closure body 26, may be assembled due to the interaction of the angled face "a" with the sleeve 16 but may not be removed therefrom due to the interaction of faces "b" and "c" of the assembly. Moreover, it may be noted that Perlmutter does not describe either his sleeve 16 or his closure body 26 as being made of a deformable material.

From the foregoing, it may be seen that the combination of Perlmutter with Porter et al does not result in a valve body that is deformable and with an ear received in a slot yet removable to allow removal of the valve body from the sleeve. Accordingly, claim 1 should be allowed.

B. It have been not have been obvious to one having ordinary skill in the art to modify the valve and sleeve structure of Porter et al to employ the slots and ears shown in Perlmutter.

Notwithstanding the facts that neither Porter et al nor Perlmutter discloses the removable valve body of claim 1, the ordinarily skilled person would simply not combine the slots and flange structure of Perlmutter with Porter et al. Porter et al is directed to a dispensing cap for a container that prevents fluid contents from being dispensed when closed yet permits fluid contents to be dispensed when opened. Porter et al goes to significant length in constructing their valve and sleeve structure to maintain a seal between the valve body, in the form of stopper 32, and the sleeve, in the form of cylindrical neck portion 24.

The Examiner effectively suggests that the cylindrical neck portion 24 of

Porter et al be provided with slots, such as the slot between arms 19 of Perlmutter, and that flange 36 be modified so as to provide ears that project into these slots in cylindrical neck portion 24. However, this construction would destroy the ability of Porter et al to maintain fluid contents in the container. Slots extending through neck portion 24 would provide fluid communication between the exterior and interior of any container on which the closure cap were used such that, even if stopper 32 were in the closed position, fluid could leak out of the container through such slots. Simply put, the ordinarily skilled person would not be led to modify neck portion 24 of Porter et al to provide openings therethrough since no way of sealing such openings with stopper 32 would not be apparent. Moreover, is the valve of Porter et al was opened, these slots would allow fluid to leak out of the side of neck portion 24 in addition to passing through hole 48.

As noted above in the introduction of the Legal Argument, in order to establish a *prima facie* case of obviousness under 35 U.S.C. §103, the Examiner must provide a reason why a person of ordinary skill in the art would have been led to modify Porter et al to combine the structure of Perlmutter. See *Ex parte Clapp*, 227 USPQ 972, 973 (Bd. Pat. App. & Int. 1985). Not only would such modification not be desirable, such modification would render Porter et al unsatisfactory for its intended purpose. Accordingly, there can be no suggestion or motivation to make the proposed modification. See *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

For the foregoing reasons, the Examiner has failed to establish a *prima facie*

case of obviousness of claim 1 so that the prior art rejection of claims 1-5, 7, 9 and 33 must be reversed.

C. **The language of Claim 34 is sufficiently definite with respect to the stop member and its relationship to the valve body.**

Turning to claim 34, the Examiner has indicated that it is allowable other than fully rejection under 35 U.S.C. §112, second paragraph. Here, the Examiner has taken the position that the phrase "is disposed thereon for limiting the longitudinal movement of said valve body within said sleeve between said open and close position" is uncertain in its reference. The full text of this portion found in paragraph (b) of claim 34 is as follows:

(b) a valve body disposed for longitudinal movement within said sleeve between an open position to permit flow of product through said passage from said container and a closed position to prevent flow of product through said passage, said valve body includes at least one stop member that projects radially outwardly having a chamfered surface in the form of a wedge that is adapted for engagement against one said guide member and is disposed thereon for limiting the longitudinal movement of said valve body within said sleeve between said open and closed positions, ...

Applicant suggests that since the stop member is recited to project radially outwardly from the valve body that "is disposed thereon" can only refer to the recitation that the stop member is disposed on the valve body. Thus, the valve body clearly includes at least one stop member that "is disposed thereon for limiting the longitudinal movement of said valve body within the sleeve between

the open and closed positions" and that this stop member has "a chamfered surface in the form of a wedge that is adapted for engagement against one said guide member". There is simply nothing indefinite about this recitation.

While the Examiner has not specified the nature of his rejection for lack of clarity, Applicant infers that the Examiner has taken the position that it cannot be determined from claim 34, paragraph (b) as to whether the stop member is disposed on the valve body or whether it is disposed on the guide member. However, this position is untenable since this paragraph clearly recites that the valve body "includes at least one stop member". Thus, the stop member could not not be disposed on the guide member that is part of the cap member recited in claim 1, paragraph (a).

Accordingly, Applicant asserts that the Examiner's rejection of claim 34 as indefinite cannot stand. Since the Examiner has indicated that claim 34 is allowable except for the rejection under 35 U.S.C. §112, second paragraph, the Board is respectfully requested to reverse the Examiner's rejection and allow claim 34.

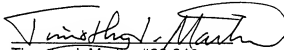
CONCLUSION

The Examiner has utterly failed to establish a prima facie case of obviousness of claims 1-5, 7, 9 and 33 as required by law; therefore, Appellant believes these appealed claims contain allowable subject matter, and respectfully requests that the Board of Appeals reverse the Examiner's decision and grant allowance on these claims.

Likewise, the Examiner is incorrect that claim 34 is indefinite in any respect. Since the Examiner indicates that claim 34 is otherwise allowable, Appellant respectfully requests that the Board of Appeals reverse the Examiner's decision and grant allowance on this claim as well.

Respectfully submitted,

TIMOTHY J. MARTIN, P.C.

A handwritten signature in black ink, appearing to read "Timothy J. Martin", written over a horizontal line.

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APPENDIX A

1. A closure for a container that is adapted to hold a product for dispensing, comprising:

(a) a cap member mountable to a container, said cap member having a product outlet passage and a sleeve defining said outlet passage that includes a guide member and a longitudinal slot along said guide member; and

(b) a valve body disposed for longitudinal movement within said sleeve between an open position to permit flow of product through said passage from said container and a closed position to prevent flow of product through said passage, said valve body having an ear projecting radially outwardly, said ear received in said slot during use and removable out of said slot to allow removal of said valve body from said sleeve.

2. The closure of claim 1, wherein said valve body includes at least one stop member for limiting movement of said valve body within said product outlet passage between said open and closed positions.

3. The closure of claim 1, wherein said valve body is radially deformable for selective removability from said passage.

4. The closure of claim 3, wherein said ear defines a stop member for limiting the longitudinal movement of said valve body within said sleeve between said open and closed positions and wherein limit ear and said slot both the longitudinal movement and restrict rotational movement of said valve body within said sleeve.

5. The closure of claim 4, wherein said valve body includes a pair of said stop members in the form of ears disposed on opposite sides of said valve body, and wherein said sleeve includes a pair of guide members defining a pair of oppositely disposed slots each sized to respectively engage one of said ears to define and limit the longitudinal movement of said valve body between said open and closed positions.

7. The closure of claim 3, wherein said cap member further includes a central post extending axially along of said sleeve, and wherein said valve body includes a central cavity and a closed outer end having an aperture therein, said valve body being mountable for longitudinal movement along said post, said post being engaged within said aperture when said valve body is in said closed position and disengaged with said aperture when said valve body is in said open position.

9. The closure of claim 7, wherein said deformable valve body includes an open inner end positioned within said sleeve and communicating with the interior of said container to enable said valve body to be radially outwardly deformed by internal pressure within said container to increase the sealing capacity of said valve body in conjunction with increases in the internal pressure of said container.

33. The fluid container of claim 1, wherein said valve body is constructed from elastic material to permit selective deformation and removal thereof from said outlet passageway.

34. A closure for a container that is adapted to hold a product for dispensing, comprising:

(a) a cap member mountable to a container, said cap member having a product outlet passage and a sleeve defining said outlet passage that includes a guide member and a longitudinal slot along said guide member; and

(b) a valve body disposed for longitudinal movement within said sleeve between an open position to permit flow of product through said passage from said container and a closed position to prevent flow of product through said passage, said valve body includes ~~at least one stop member~~ that projects radially outwardly having a chamfered surface in the form of a wedge that is adapted for engagement against one said guide member ~~and is~~ disposed thereon for limiting the longitudinal movement of said valve body within said sleeve between said open and closed positions, said stop member being seated within said slot to also restrict the rotational movement of said valve body within said sleeve, said valve body being radially deformable for selective removability from said sleeve passage in response to selective rotational force imposed on said valve body in its open position to assist in deforming said valve body radially inwardly.

*A surface
is not "disposed
thereon*